American Bankers Association

Rob Nichols
President and CEO
202-663-7512
rnichols@aba.com

April 20, 2021

The Honorable Blake Paulson
Acting Comptroller of the Currency
Office of the Comptroller of the Currency
400 7th Street, SW
Washington, DC 20219

RE: Attempted Credit Union Acquisitions of Federal Mutual Banks

Dear Acting Comptroller Paulson:

I am writing to express the concern of the American Bankers Association (ABA)[1] about an apparent trend of credit unions purchasing, or attempting to purchase, federally-chartered banks, including federal mutual savings associations.

As the representative of America's banking industry, ABA's membership includes 483 banks and savings institutions organized in mutual form. For the reasons discussed below, ABA believes there are serious policy and legal issues that, if not appropriately addressed, could severely damage the mutual business model and deprive our mutual members' customers and communities of its benefits. In particular, ABA believes that these purchases may not comply with applicable law and contravene longstanding Federal policies governing mutual institutions, including those of the Office of the Comptroller of the Currency (OCC).

ABA notes, first, that Congress has authorized the OCC to adopt regulations for mergers of Federal savings associations with other "savings associations."[2] As a threshold matter, it is therefore unclear that OCC has the power to provide a mechanism for acquisition of assets or liabilities of a Federal savings association by an entity such as a credit union.[3] Although the OCC would have power to approve a liquidation of a Federal savings association,[4] the distinction between its powers to prescribe regulations for mergers and to prescribe those for liquidations is significant. We have concerns that those distinctions may be motivation for acquiring credit unions to structure what are in substance mergers as acquisitions of liquidated assets.

There are important policy reasons for imposing strict limits on the situations in which a mutual institution can engage in a business combination with an institution in another form. A mutual institution has equity, in the form of surplus generated from earnings, but, unlike the case of a stock institution, "[t]his equity belongs to the depositors as a group, but is not divisible among them except in the event of dissolution."[5]

---

[1] The American Bankers Association is the voice of the nation's $21.9 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard $17.8 trillion in deposits and extend nearly $11 trillion in loans.

[2] *See* 12 USC §1464(d)(3).

[3] ABA notes also that, if a credit union assumes any part of the deposits of a Federal savings association, that assumption would in any case require the approval of the Federal Deposit Insurance Corporation. *See* 12 USC §1828(c)(1).

[4] *See* 12 USC §1464(d)(3)(A). *See also* 12 USC §1467a(s), which appears to allow other acquisitions of Federal associations, but limits transaction parties to "insured depository institutions," those whose accounts are insured by the Federal Deposit Insurance Corporation.

[5] Office of Thrift Supervision, Business Transactions Division, Memorandum: Mutual Savings Associations and Conversion to Stock Form (May 1997) ("OTS Memorandum"), at page 1. This position reflects longstanding Federal court interpretations of the rights of depositors in mutual institutions, *e.g., Society for Savings v. Bowers,* 349 U.S. 143, 150 (1955).

ABA understands that historically OCC has normally not approved voluntary dissolutions of healthy mutual institutions. OCC's position has been that "regulators of mutual FSAs (currently the OCC and previously the Office of Thrift Supervision (OTS) and the Federal Home Loan Bank Board (FHLBB)) have not allowed voluntary dissolutions of mutual FSAs unless the mutual FSA at issue reflected significant supervisory concerns and an alternative…was not feasible."[6] In a similar vein, OCC approves merger conversions (in which an existing stock institution acquires a converting mutual institution) when the mutual institution is distressed and has no reasonable alternative.[7]

There are sound policy reasons for this position, which ABA wholeheartedly supports. Since depositors' interest in the accumulated surplus of a solvent mutual institution cannot be distributed except in the event of a voluntary liquidation (and, for obvious practical reasons, only in the event the institution is solvent), making such liquidations easy procedurally would tempt depositors and management to liquidate institutions to release that value, to the detriment of banking services in the institutions' communities. It is not in the public interest to see institutions vanish to distribute the accumulated earnings of years of sound, profitable operations.

In addition, ABA notes that current OCC regulations for "voluntary liquidations" of mutual institutions require that OCC "assess the advisability of, and alternatives to, liquidation and the effect of liquidation on all concerned."[8] The significant legal and policy concerns noted above make clear OCC should be transparent about its evaluation of such transactions, the standards it applies, and the details of any transaction that are relevant to the serious policy considerations at stake. Given the extensive legal framework around the rights of mutual institution depositors, the limitations on those rights, and the potential for harm if business combinations with mutual institutions are not carefully scrutinized, any transactions' key details should be disclosed in the public interest.

For the reasons set forth above, ABA respectfully requests that OCC deny any application for the liquidation of a Federal mutual savings association and a credit union's acquisition of its assets, in light of the significant divergence from its established policies governing liquidations of mutual savings associations. In addition, we urge OCC to disclose publicly its policy analysis in making decisions on any such application.

Thank you for your consideration of these concerns. The ABA remains deeply committed to protecting the rights and privileges of mutual institutions and their depositors, as well as addressing the broader issues associated with the ever-increasing trend of credit unions seeking to acquire federally-chartered banks. This trend poses significant legal and policy questions for the OCC and other federal regulators that likewise require further consideration.

If you have any questions or would like further information, please do not hesitate to contact Joseph Pigg at 202-663-5480 or jpigg@aba.com.

Sincerely,

Rob Nichols

[6] Brief of Amicus Curiae, *The Office of the Comptroller of the Currency, Chase v. First Federal Bank of Kansas City* (July 5, 2018), Footnote 7.
[7] *See Comptroller's Licensing Manual* (Jan. 2019), at pages 9-10.
[8] 12 CFR §5.48(d)(3.